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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

ORGANIZED VILLAGE OF KAKE, *Appellant,*

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

ANGOON COMMUNITY ASSOCIATION, *Appellant,*

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

R. L. JERNBERG
C. L. CLOUDY
EDWARD G. DOBRIN
Attorneys for Appellants

312 Commercial Building
P. O. Box 893
Ketchikan, Alaska

THE ARGUS PRESS, SEATTLE

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vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

No. .....

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

Appellants are appealing from a judgment of dismissal of their complaints for injunctive relief entered by the District Court for the State of Alaska, Division Number One, Juneau, Alaska, on July 2, 1959. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this appeal and to show that a substantial question is presented under the rules of this court.

THE OPINION BELOW

The opinion of the court below was rendered July 1, 1959, and is unreported at this time. If eventually

selected for reporting in the Alaska Reports, it will be reported in 18 Alaska Reports. A copy of the opinion is included in Appendix 1.

JURISDICTION

1. The suit of the appellants is one to enjoin the enforcement of certain Alaska criminal statutes (17 SLA 1959, 95 SLA 1959) which purport to make it a crime for them to install, maintain and operate floating fish traps at sites authorized by the Secretary of the Interior in the waters of Alaska. Injunction is sought on the grounds that the Alaska statutes, as to the appellants, are in conflict with federal statutes and regulations.

2. The District Court for the State of Alaska, Division Number One, Juneau, Alaska, entered the judgment dismissing the complaints of appellants on July 2, 1959.

Oral notice of appeal was entered on July 1, 1959, following the rendering of the opinion upon which the judgment was later entered. Notice of appeal to the Supreme Court of the United States was filed August 6, 1959, in the District Court for the State of Alaska, Division Number One, Juneau, Alaska.

3. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 USC 1257 (1) and (2). The District Court of Alaska is the highest court of the State of Alaska in which a decision could be had. The *Coquitlam v. United States* (1896) 163 U.S. 346, 16 S.Ct. 1117, 41 L.ed. 184; *Lindeberg v.*

Howard (CCA 9th 1906) 146 F. 467, CCA 23, 8 Ann. Cas. 709. Article XV, Section 17 Constitution of the State of Alaska. Although appellate review formerly could be had in the Court of Appeals for the Ninth Circuit, that court has decided it cannot take jurisdiction of cases decided by the District Court of Alaska after January 3, 1959. *Parker v. McCarrey,* No. 16,499 .....F.(2d).....

4. The cases believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal are as follows:

Gully v. First National Bank, 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96;

Mallinckrodt Chemical Works v. Missouri, 238 U.S. 41, 59 L.ed. 1192;

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.ed. 184.

5. The provisions of the statutes involved are lengthy and they are set forth in Appendix 4. The citations are as follows:

43 Stat. 464, 48 USC 221 (1924)
43 Stat. 464, 48 USC 222 (1924)
72 Stat. 339 (1958)
67 Stat. 29, 43 USC 1301 (1953)
Constitution of the State of Alaska, Article XII, Section 12
24 F. R. 2053, 2056, Section 102.10 and 115.26
1959 Session Laws of Alaska, Chapter 17
1959 Session Laws of Alaska, Chapter 95
1957 Session Laws of Alaska, Chapter 170
48 Stat. 985, 25 USC 465 (1934)
73 Stat. 141 (1959).

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6(e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellants by the State and its officials and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053, *et seq.*) March 7, 1959, allowing appellants to fish the trap sites therein designated a valid exercise of that authority?

2. If Section 6(e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6(e) violate the "equal footing" doctrine governing the admission of new States to the Union?

3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically Article XII, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and IF SO, IS SECTION 4 ~~further are the~~ of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the States, and further are the regulations issued by the Secretary of the Interior (24

FR 2053, *et seq.*) March 7, 1959, allowing appellants to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska, and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

STATEMENT OF THE CASE

Appellants are Federal Corporations, chartered as organized Indian Villages under the provision of the Wheeler-Howard Act, 48 Stat. 985, 25 USC 465 (1934). Membership in each corporation includes all the inhabitants of the Thlinget Indian villages of Kake, Alaska (numbering 400), and of Angoon, Alaska (numbering 300). The village of Angoon is located on the southwest side of Admiralty Island, Alaska, approximately 60 miles southwest of Juneau, Alaska, and the village of Kake, Alaska, is located on the northwest side of Kupreanof Island, Alaska, approximately 100 miles southwest of Juneau, Alaska. In 1948 the United States of America purchased two salmon canneries including fish traps and related gear taking title in its own name, naming the appellants as beneficiaries; thereafter appellant Kake commenced doing business under the name of KEKU CANNING Co., and appellant Angoon commenced doing business as HOOD BAY SALMON Co., that from 1948 to date appellants have operated these canneries in the processing of salmon

caught through use of fish traps; that the operation of the canneries and utilization of the fish traps was undertaken by the appellants for the purpose of furnishing employment for the members of the Angoon Community Association and the Organized Village of Kake Alaska, and to provide a means of allowing them to have their social and economic welfare advanced through self-employment designed to promote the advancement of the people of the said community and village in a manner compatible with the intention of Congress of the United States to care and provide for the social and economic welfare of the Indian. That at this time, the appellants' canneries constitute the sole means of support for substantially all inhabitants of Angoon and Kake through direct payroll, fish purchases and profit distribution.

On July 7, 1958, Congress enacted the Alaska Statehood Act, 72 Stat. 339, under the terms of which the Alaska Constitution was ratified and affirmed. Under Section 4 of the Statehood Act, the State disclaimed all right and title to land and property which Congress reserved to the control of the United States, namely "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts. . . . " The Third Ordinance of the Constitution of Alaska abolished all use of fish traps in Alaska. Section 6(e) of the Statehood Act withheld control of the Alaska fish and wildlife from Alaska until the Secretary of the Interior certified the transfer. In November, 1958, the Secretary of the Interior announced his intention to abolish fish traps in Alaska

with the exception of native owned traps. On February 25, 1959, and April 17, 1959, the legislature of Alaska enacted 17 SLA 1959 and 95 SLA 1959 making it a crime to erect, moor, or maintain fish traps in Alaska. On March 7, 1959, the Secretary of the Interior issued his 1959 fishing regulations for Alaska and authorized appellants to use seven (7) of their thirteen (13) trap sites for 1959. The Secretary of the Interior on March 10, 1959, advised appellants they could use their traps and could proceed to plan for 1959 accordingly. On or about May 21, 1959, appellee publicly noted his intention to prevent appellants from operating their traps, and on or about June 1, 1959, appellee dispatched two patrol boats manned with armed officers of the State of Alaska to patrol the area of appellants' trap sites, and on June 15, 1959, appellee caused the arrest of the president of the Council of appellant Kake and the seizure of one of its fish traps. The appellants sued to enjoin the enforcement of 17 SLA 1959 and 95 SLA 1959. The complaints alleged that the appellants would suffer irreparable harm unless the appellee was restrained for two reasons: (1) although a portion of the damages could be equated with money, the laws of Alaska prevent a suit for damages against appellee, (2) a large portion of the damages could not be equated with money. Appellants further alleged that they cannot operate their canneries without the use of fish traps, and that they would be forced to drastically curtail their operations to the point of shut-down, thus causing loss of investment, loss of payroll to their members, and

destruction of the economy of their villages of Kake and Angoon.

How the Federal Question Is Presented

Appellants based their suit on the grounds that exclusive control over the management of fish and wildlife in Alaska was reserved to the Federal Government for 1959, and that control over the Indian fishery was reserved to the Federal Government until further act of Congress and therefore the Alaska criminal statutes were of no application in view of the regulation of the Secretary of the Interior allowing appellants to fish their traps (Complaints, Tr. 6, 29). The appellee filed motions to dismiss appellants' complaints on the grounds they failed to state a cause of action (Tr. 52, 54). Briefs were filed by appellants (Tr. 181) and appellee (Tr. 68), and hearing had. After the hearing the District Court entered orders of dismissal of the complaints (Tr. 145, 146) in accordance with its opinion that the Alaska criminal statutes involved were enforceable as to the appellants, that the Secretary of the Interior was without authority to allow the appellants to fish their traps, and that the doctrine of "equal footing" gave Alaska as a state full control over all fishing within Alaska, Federal statutes notwithstanding (Tr. 133).

Appellants gave oral notice of appeal in the District Court of the State of Alaska and moved for a preliminary injunction pending appeal to the Supreme Court of the United States. The motion was denied, and application was then made to Mr. Justice Brennan

for a preliminary injunction pending appeal to the Supreme Court of the United States. This application was granted and the appellee was enjoined from interfering with appellants' fish trap operations pending the filing and determination of this appeal.

The Questions are Substantial

This appeal involves the immediate question of whether or not the appellants can fish with fish traps in Alaska when they are authorized to do so by the laws of the United States and when they are prohibited from doing so by the laws of Alaska. The resolution of this question raises issues of vital importance to future Federal-State relationships in the field of control of fish and wildlife and in the field of control of Indian welfare. Appellants rest their claim to fish their traps on an assertion that the Federal Government has exclusive power to not only provide for Indian welfare but also to exercise a measure of control over the fish and wildlife of a State in providing for the Indian welfare. This claim has been denied by the District Court of the State of Alaska on the grounds that the Constitutional right of the State of Alaska to be admitted into the Union "on equal footing" with the other States would be infringed upon if the State was denied the right of exclusive control over its fish and wildlife. The frustration of Federal control over the welfare of the Indian that would result from State control in this instance was not considered a deterrent to State control. The claim of right of the appellants is based directly upon the language of the Alaska State-

hood Act, 72 Stat. 339, and the regulations of the Secretary of the Interior issued thereunder, 24 CFR 2053-2069. The language in the Act relied upon by the appellants has never before been used in statehood legislation, and a factual background similar to that of appellants has never before become involved in litigation involving interpretation of statehood legislation. For that reason, the far-reaching forecast of *Coyle v. Smith*, 221 U.S. 559, 55 L.ed. 853, and all subsequent equal footing cases whose decisions rest thereupon, do not now foreclose inquiry into these issues.

Appellants seek to restrain the enforcement of the criminal statutes of the State of Alaska. Application for injunctive relief is based upon the claim that unless the appellee is restrained, appellants will suffer irreparable harm through seizure of their equipment, loss of profits, imprisonment of their employees, loss of payroll to their members and general rupture of their economy for which either no action at law lies against the appellee under the laws of Alaska or for which money damages would not be an adequate remedy for the loss. Circumstances such as these warrant the issuance of an injunction to prevent the enforcement of the State criminal statute involved. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S.Ct. 968 (1949). Appellants' right of fishery is a property right entitled to the protection of injunction, *Hynes v. Grimes Packing Co., supra.*

The Alaska Statehood Act, 72 Stat. 339, expresses a congressional intent to withhold control of the fish and wildlife resources within Alaska from Alaska for

the year 1959, and also to withhold such control as is necessary to allow the Federal Government to exercise exclusive control over Indian fishing in Alaska until such time as Congress releases that control to the State.

Section 6(e) of the Act expressly denies to Alaska any power of control over its fish and wildlife until certain conditions are met in "the broad national interest." The time limit therein expressed has been since defined, and Federal control will cease January 1, 1960. Congress has exercised absolute control over the fish and wildlife in Alaska since it was acquired as a Territory, and in that exercise has delegated supervision to the Secretary of the Interior under the White Act, 43 Stat. 464, 48 USC 221 (1924). Pursuant to that legislation, the Secretary has issued regulations from year to year governing the taking of salmon in Alaska. Violation of the regulations invokes the sanctions of the White Act, including fine, imprisonment and seizure of equipment. The Secretary issued his 1959 regulations on March 7, 1959, 24 CFR 2053-2059 and expressly allowed appellants to fish certain traps, and at the same time prescribed complete regulations for taking of salmon in Alaska for the year 1959. Under these circumstances, no criminal statute of Alaska could have any force and effect in regulating how appellants shall fish in the waters of Alaska in 1959.

Section 4 of the Alaska Statehood Act comprehends a complete reservation of control by Congress unto the Federal Government over Indian fishing in Alaska. This section expressly reserves to Federal control "any

lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives . . ." Considerable speculation has been voiced by appellee as to what this section does not mean. However, the language is plain that Indian fishing is not to be controlled by the State until Congress otherwise directs. Similar language appears in Article XII, Section 12, of the Alaska Constitution, which is made a part of the Alaska Statehood Act by those provisions in the preamble of the Act ratifying the Constitution. The fact that the appellants were exercising a fishing right through the use of fish traps owned by the United States as trustee at the time Section 4 was enacted does much to suggest the language of Section 4 was tailored to cover that very situation. The record is clear that the Secretary of the Interior interpreted this section of the Statehood Act to allow the appellants to continue fishing as they had in the past subject to his regulation. This interpretation is entitled to great weight in determining what Congress intended by Section 4 if there is any ambiguity in that language. *Fawcus Machine Co. v. U.S.*, 282 U.S. 375.

Appellee has urged that no matter what control is withheld from Alaska by Section 6e or Section 4 of the Statehood Act, the Secretary of the Interior cannot specially allow appellants to fish their traps and deny all others that right, because such action violates the White Act prohibition against the grant of an exclusive fishery by the Secretary, 43 Stat. 464, 48 USC 222. Section 4, however, by providing specially for Indian

fishing under Federal control, must be considered to have amended the White Act to that extent. Section 6e declares that administration for 1959 by the Secretary must be "under existing laws." The preamble to the Statehood Act makes the Constitution of Alaska "existing law," and in so doing brings into play the language of Article XII, Section 12 thereof which also provides specially for Indian fishing, and to that extent likewise amends the White Act, even for the year 1959.

Congress has the right to either withhold complete control of the fish and wildlife in Alaska from Alaska or to withhold such control as is necessary to provide for the welfare of the Indian. Neither type of withholding violates the "equal footing" doctrine. As to the Indian alone, the exclusive right of the Federal Government to exercise control over the Indian has been long recognized as an exercise of the Constitutional power given the Federal Government and not a violation of the doctrine of "equal footing." The welfare of the Indian is not something peculiarly within the sovereignty of a State. *Coyle v. Smith, supra; U.S. v. Sandoval,* 231 U.S. 34, 58 L.ed. 107; *US. v. Chavez,* 290 U.S. 357. As to the complete control of the fish and wildlife, the question has not before been squarely presented to the Court. However, the *Coyle v. Smith* case clearly excludes areas dealing with property from State control under "equal footing," as opposed to those areas dealing with political rights. Regulation and management of the fish and wildlife suggests a problem in property rather than in politics. The decisions of this Court in *Manchester v. Massachusetts,* 139 U.S. 240, 35 L.ed.

159, and *Skiriotes v. Florida,* 313 U.S. 69, in upholding State control of fish and wildlife with special emphasis on the absence of conflicting Federal legislation in each instance likewise suggest that this is a field for Federal control if Congress elects to enter it.

The nature of this case and the rulings of the District Court of the State of Alaska are such as to bring the case within the jurisdictional provisions noted in Title 28 and the cases hereinbefore cited to sustain the jurisdction. Appellants filed their case in the District Court of the State of Alaska, which is the highest court in the State of Alaska in which a decision could be had. Their complaints were based upon a right to fish certain traps pursuant to express allowance by the laws of the United States, namely 72 Stat. 339, Section 4 and the regulations of the Secretary of the Interior 24 CFR 2053-2059. Appellants' rights under the laws of the United States were thus made an essential element of their cause of action and brought the case within 28 USC 1257 (1) and (2). *Gully v. First National Bank* (1936) 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96. The opinion of the Court that the Federal laws upon which appellants relied violated the "equal footing" doctrine and for that reason were of no force and effect against conflicting Alaska law also brings the case within the jurisdictional provisions of Title 28. *Mallinckrodt Chemical Works v. Missouri,* 238 U.S. 41, 59 L.ed. 1192; *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.ed. 184.

It is submitted that the decision of the District Court

of the State of Alaska fails to recognize the supremacy of Congressional enactments over conflicting State law in the fields of management of fish and wildlife and control of Indian welfare. In so doing, it authorizes the State of Alaska to interfere with the exercise of Indian fishing in violation of the laws of the United States. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

R. L. JERNBERG
C. L. CLOUDY
EDWARD G. DOBRIN
Attorneys for Appellants

312 Commercial Building
P. O. Box 893
Ketchikan, Alaska

August 15, 1959

APPENDIX 1

OPINION OF THE DISTRICT COURT FOR THE STATE OF ALASKA

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

ORGANIZED VILLAGE OF KAKE, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, *Defendant.*	Civil Action No. 8063-A
ANGOON COMMUNITY ASSOCIATION, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, *Defendant.*	Civil Action No. 8064-A

and

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a federally chartered corporation, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Defendants.*	Civil Action No. 8066-A

OPINION

Filed July 1, 1959

R. L. JERNBERG, of Gore & Jernberg, Ketchikan, and C. L. CLOUDY, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiffs Organized Village of Kake and Angoon Community Association.

ROBERT H. ZIEGLER, SR., and A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiff Metlakatla Indian Community, Annette Islands Reserve.

JOHN L. RADER, Attorney General of Alaska, JAMES M. FITZGERALD, Special Assistant Attorney General, and DOUGLAS L. GREGG, Assistant Attorney General, for defendants.

KELLY, Judge.

The first two captioned cases were consolidated for trial, and the third was heard the following day. Because of the similarity of the actions, the three cases are consolidated for the purpose of this opinion.

The urgency of this matter makes immediate determination imperative. It would, of course, be desirable if my decision could be based on a written opinion as complete as the able briefs of counsel for both parties filed herein, but time does not permit the preparation of a formal opinion, so it must suffice that I announce my decision from the bench and do as well as possible from notes and excerpts from decisions.

I need hardly state that I agree with counsel on both sides in their expressed regard for the importance of this action now before us for decision.

We have here a conflict between the authority of the Secretary of the Interior, an officer of the United States, and the Governor of Alaska. In this it is not a conflict of these officials as individuals or personalities, but of what they represent in this controversy.

We have in effect the state opposed to the United States.

We have the majesty of the nation on one hand and the sovereignty of the state on the other; in between, three Indian communities whose plight in the dwindling fish economy of Alaska is a matter of grave concern.

Where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority, the difficult and tender problem of resolving, under existing law and judicial decisions, the questions thus arising, with due regard to the dignity of the one and the sovereignty of the other, becomes the delicate task of the Court.

Able and convincing arguments have been capably presented by counsel for both sides.

The facts are substantially agreed upon and are fully set forth in the pleadings, briefs and recorded statements of counsel.

After reading the pleadings and briefs, hearing the arguments, examining the exhibits and affidavits, and studying numerous authorities, I have concluded that the relief sought in these three cases must be denied and the bills of complaint therein dismissed.

I will try and state my reasons for this decision.

This Court can take judicial notice of the following facts and conditions and matters of general knowledge:

(1) There has long been growing opposition to fish traps in Alaska, and plebiscites held in the Territory in connection therewith have resulted overwhelmingly in votes for the abolishment of traps.

(2) The three Indian villages here concerned as plaintiffs in these actions had voted overwhelmingly for the abolishment of traps.

(3) The salmon runs in Alaska are being rapidly depleted.

(4) The use of fish traps takes great numbers of fish from Alaskan waters for the benefit of the few who own or control the traps.

(5) Even with trap operations, many canneries have been compelled to close in Alaska in recent years, because of lack of an adequate fish supply.

(6) Traps were reduced over the years in number and curtailed in operation, and finally abolished by the state, the well-known purpose of which was to conserve the salmon supply for the benefit of all of the people of the state as a whole.

(7) Financial loss occurred to some who owned or controlled the traps each time they were cut in number or limited in operation.

I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

Mr. Justice Reed, in *Alabama v. Texas et al.*, 347 U.S. 272 at page 275, stated:

> "If the marginal lands were thus declared by the *California* and following cases to belong to the United States, they were ceded to the states through the subsequent Submerged Land Act of 1953 by the clause: 'Title to and ownership of the

> lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States . . ." Sec. 3(a). If, on the other hand, the marginal lands were not declared by those cases to belong to the United States, title to them remained in the respective states. Either by original ownership or by the cession of the Act, the lands are now the property of the respective states . . .

The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act.

Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state.

No property right exists in fish traps and their use has been legally prohibited in the state.

The "equal footing" clause has long been held to refer to political rights and to sovereignty and to have a direct effect on certain property rights, and the question arose early in controversies between the states and the federal government as to ownership of the shores of navigable waters, and it was held that to deny to the states, admitted subsequent to the formation of the union, ownership of this property, would deny them admission on an equal footing with the original states. *Pollard's Lessee v. Hagan,* 44 U.S. 212, 228-229 and cases cited.

Upon the admission of a state to the Union the title

of the United States to lands underlying navigable waters within the state passes to it as incident to the transfer to the state of local sovereignty and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. *United States v. Oregon,* 295 U.S. 1, 14.

The lands on which the fish traps are to be moored are tidelands or lands underlying inland waters, and subject to the authority of the state to regulate fishing.

Of course the United States has responsibility under laws passed by Congress toward the Indians. The United States has made treaties—solemn pacts with Indian nations. Indians have been accorded rights by the United States in Territories and in lands controlled by the United States, but many of these rights disappear when a new state is formed. *Ward v. Race Horse,* 163 U.S. 504. In this case, on page 514, Mr. Justice White stated as follows:

> " * * * It may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. * * * "

See also *Kennedy v. Becker,* 241 U.S. 556; *U.S. v. Winans,* 198 U.S. 371 (384). An Indian reservation created by executive order of the President conveys no right of use or occupancy beyond the pleasure of Congress and the President.

When an Indian reservation is established by treaty the right of use or occupancy depends upon the language or the purpose expressed therein.

Congress has power to make a reservation inclusive of the adjacent waters and submerged lands as well as uplands * * *. The reservation thus created is not a private grant but simply a setting apart until otherwise provided by law.

Statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. (See *Alaska-Pacific Fisheries v. United States,* 248 U.S. 78, pages 87 and 89.)

The reservation of the Metlakatla Indians was created at the will of Congress and did not constitute final disposal of the lands underlying the navigable waters. The extension of the 3,000 feet to include exclusive fishing rights by the President likewise did not constitute final disposal but only a grant until otherwise provided by law. The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce. *Pollard's Lessee v. Hagan,* 44 U.S. 212. The

presidential order which extended the exclusive fishing rights 3,000 feet offshore simply prohibited others from fishing therein and cannot be construed to permit the use of traps therein when prohibited by state law.

Under territorial status the Annette Island natives could not claim any vested property right in any particular method or means for taking fish. Their authority to operate a fishery at all came from the Secretary of the Interior under the provisions of the White Act.

The state regulates and controls wildlife resources and fisheries in the marginal sea. This was originally based on a concept of ownership. (*McCready v. Virginia*, 94 U.S. 391). This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people.

The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people.

Geer v. Connecticut, 161 U.S. 519. See also
Skiriotes v. Florida, 313 U.S. 69;
Toomer v. Witsell, 334 U.S. 385;
Corsa v. Tawes, 149 Fed. Supp. 771.

The right to control fisheries rests in the state in the absence of affirmative action of Congress. *Manchester v. Mass.*, 139 U.S. 240.

Fish and game are owned by the states, not as proprietors, but in their sovereign capacity as the repre-

sentatives and for the benefit of all their people in common. *U.S. v. Shawver,* 214 Fed. 154.

The White Act, 48 USC Sec. 221, was passed by Congress to protect and conserve fisheries in Alaska. It was amended by Sec. 6 (e) of the Alaska Statehood Act, which contained the so-called Westland proviso. The constitution of the State of Alaska became effective simultaneously with the Statehood Act, and with it Ordinance Number Three, which for reasons therein stated, abolished the use of fish traps for the taking of salmon for commercial purposes in all the coastal waters of the State.

If the White Act is amended by Sec. 6 (e) and by Ordinance Number Three as interpreted by the Secretary of the Interior (*Ketchikan Packing Co. v. Seaton,* opinion filed May 14, 1959, United States Court of Appeals for the District of Columbia) then the White Act must prohibit the use of traps in Alaskan waters.

The *Ketchikan Packing* case holds that Congress intended the Secretary to be a trustee for both the federal government and the new state during the transition of administration from the federal to the state authorities in the broad national interest. It further held that the Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska existing on January 3, 1959, the effective date of the Alaska Statehood Act and the Alaska constitution, and Ordinance Number Three.

The authority conferred upon the Secretary by existing law, as above set forth, should not be permitted

to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state.

The White Act is still in effect and is the Act from which the Secretary of the Interior derived his authority, and this Act specifically states that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein. Therefore the White Act forbids exclusive right of fishery. This was the holding in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86, at page 122:

> As Sec. 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon Sec. 1 of the White Act, we think it clear that its proviso that no exclusive or several right of fishery shall be granted therein applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights * * * The White Act fishing preserves were not intended to furnish a monopoly to a favored few.* * *

There are many cases besides those which I have mentioned which have been cited by counsel in their briefs and arguments which support the conclusions

here reached, that the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought.

Findings of fact, if desired, may be presented, together with Judgment and Decree in accordance with this opinion.

RAYMOND J. KELLY
U.S. District Judge

Supplemental Finding of Fact No. 1

The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon and ending at a line drawn from the northernmost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82, 275, are all inland waters and historic bodies of water. Because of historic, social and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska.

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea.

That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fjords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

That the historical economy of the area involved is primarily oriented to a marine way of life in which the

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inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

Supplemental Finding of Fact No. 2

Although plaintiff may suffer some loss if the right to fish by means of fish traps is denied, still I find that the damages alleged are to a large extent speculative in nature because of (1) the limited predictability of the salmon runs, (2) the existence of an independent fleet of seine boats with whom plaintiffs are free to bid for their catch on the basis of the price offered therefor, and (3) the possibility of increased catches by plaintiffs' own seine boats resulting from the abolition of fish traps.

Supplemental Finding of Fact No. 3

The Court judicially notices that fish traps, whether of the floating or pile-driven variety, are customarily affixed to the shoreline with the remainder necessarily extending out over tidelands and beyond into the navigable waters below the meander line of mean low tide.

APPENDIX 2

JUDGMENT OF THE DISTRICT COURT FOR THE STATE OF ALASKA

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

In the Matter of the ORGANIZED VILLAGE OF KAKE, *Plaintiff*, vs. WILLIAM A. EGAN, *Defendant*.	No. 8063-A

ORDER FOR DISMISSAL

THIS MATTER having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through his counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

WITNESS my hand and seal of this honorable Court this 2nd day of July, 1959.

/s/ RAYMOND J. KELLY
District Judge

[Seal]

APPENDIX 2a

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE AT JUNEAU

In the Matter of the ANGOON COMMUNITY ASSOCIATION, *Plaintiff*, vs. WILLIAM A. EGAN, *Defendant*.	No. 8064-A

ORDER FOR DISMISSAL

THIS MATTER having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which supplemental findings of fact is in lieu of findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

WITNESS my hand and seal of this honorable Court this 2nd day of July, 1959.

/s/ RAYMOND J. KELLY
District Judge

[Seal]

APPENDIX 3

STATUTES INVOLVED

43 Stat. 464, 48 USC 221 (1924)

Fishing areas, closed season, limitation on fishing.

For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska, the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein, (b) limit the catch of fish to be taken from an area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable.

43 Stat. 464, 48 USC 222 (1924)

Unlawful fishing in areas no exclusive rights to be granted citizens.

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish, and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of the Interior shall

be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior.

72 Stat. 339 (1958) Alaska Statehood Act

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled. That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska, to submit the constitution to the people for adoption or rejection, to prepare for the admission of Alaska as a State, to make an appropriation, and setting an effective date, approved March 19, 1955 (Chapter 46, Session Laws of Alaska 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Sec. 2. The State of Alaska shall consist of all territory together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

* * * *

Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives); or is held by the United States in trust for said natives that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation . . .

Sec. 6 (e). All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478, 48 U.S.C. secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C. secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws

until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . .

Sec. 6 (m). The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session, 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Sec. 8 (b). At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

"(1) Shall Alaska immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Alaska shall be prescribed in the Act of Congress approved (date of approval of this Act) and all claims of this state to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved (date of approval of this Act) reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregonig propositions is adopted at said election by a majority of the legal votes

cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission the provisions of this Act shall thereupon cease to be effective.

Sec. 30. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed.

67 Stat. 29, 43 USC 1301 (1953)

Sec. 2. When used in this Act—(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which for-

merly were lands beneath navigable waters, as hereinabove defined.

* * * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp and other marine animal and plant life but does not include water power, or the use of water for the production of power.

* * * *

67 Stat. 30, 43 USC 1311

Sec. 3. Rights of the States—

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law, be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

ARTICLE XII, Section 12, Constitution of the State of Alaska

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not

granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, unless otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

24 FR 2053, 2056, Section 102.10:

Types of gear permitted, salmon fishing. In fishing for salmon all forms of gear other than drift gill nets, set nets, purse seines, beach seines, fish wheels, trolling apparatus, hand lines, rods, spears, and gaffs are prohibited at all times. Traps are prohibited, except native Indian-owned traps specifically authorized in Part 115.

Section 115.26:

Sites open to native Indian traps:

Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(a) *Annette Island Fishery Reserve*

(1) Annette No. 3, located at 55°02′47″ N. lat., 131° 38′53″ W. long.

(2) Annette No. 4, located at 55°05′47″ N. lat., 131° 36′39″ W. long.

(3) Annette No. 6, located at 55°00'45" N. lat., 131° 38'30" W. long.

(4) Annette No. 8, located at 55°10'13" N. lat., 131° 19'31" W. long.

(b) *Organized Village of Kake*

(1) Kake-Cape Fanshaw, located at 57°10'52" N. lat., 133°32'44" W. long.

(2) Kake-Point Pybus, located at 57°18'40" N. lat., 133°57'21" W. long.

(3) Kake-Point Mccartney, located at 57°01'23" N. lat., 134°02'50" W. long.

(4) Kake-Cornwallis, located at 56°55'52" N. lat., 134°16'08" W. long.

(c) *Angoon Community Association*

(1) Angoon-Basket Bay, located at 57°36'16" N. lat., 134°51'34" W. long.

(2) Angoon-Eagle Island, located at 57°22'28" N. lat., 134°34'18" W. long.

(3) Angoon-Point Caution, located at 57°13'52" N. lat., 134°39'05" W. long.

17 Session Laws of Alaska, 1959

Section 1. It shall be unlawful to erect, moor or maintain fish traps, including but not limited to floating, pile driven or hand driven fish traps, on or over any lands or tidelands owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

* * * *

Section 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed six months or by fine not to exceed $1,000 or by both such fine and imprisonment.

95 Session Laws of Alaska, 1959

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Section 2. Section 1 of Chapter 17 SLA, 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters, owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska, which are other-

wise legally maintained and operated in or above the mouth of any stream or river in Alaska.

Sec. 3. Sec. 2 of Chapter 17, SLA 1959, is hereby repealed.

Sec. 4. Sec. 3 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine.

Sec. 5. A violation of this act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

170 Session Laws of Alaska, 1957

Section 1. Any person or corporation having any claim against the Territory of Alaska shall have a right of civil action against the Territory in the District Court for the District of Alaska.

Section 7. *Exceptions.* The provisions of this Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a territorial agency or an employee of the Territory, whether or not the discretion involved be abused.

48 Stat. 985, 25 USC 465 (1934)

The Secretary of the Interior is hereby authorized in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * * *

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

73 Stat. 141 (1959)

Sec. 2 (a). Section 4 of the Act of July 7, 1958 (72 Stat. 339) providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives" and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for natives.

(b) Section 6 (e) of said Act is amended by striking out the word legislative and inserting in lieu thereof the word "calendar."